

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter

) EB Docket No. 07-147
)
PENDLETON C. WAUGH, CHARLES M.) File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP) NAL/Acct. No. 200732080025
)
PREFERRED COMMUNICATION) FRN No. 0003769049
SYSTEMS, INC.)
)
Licensee of Various Site-by-Site Licenses)
in the Specialized Mobile Radio Service)
)
PREFERRED ACQUISITIONS, INC.) FRN No. 0003786183
)
Licensee of Various Economic Area Licenses)
in the 800 MHz Specialized Mobile Radio)
Services)

To: The Commission

**REPLY TO MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE AND
ENFORCEMENT BUREAU'S STATEMENT OF CLARIFICATION**

1. Pendleton C. Waugh ("Waugh"), by and through counsel, hereby files a Reply to Memorandum in Opposition to Motion to Strike and Enforcement Bureau's Statement of Clarification. In support the following is shown:

2. A document entitled "Confidential" and addressed to Chairman Genachowski and to the attention of the Acting Assistant Chief of the Investigations and Hearing Division was filed by Mr. Toshiaki (Toshi) Saito ("Saito") and dated August 13, 2010 (hereinafter "August 13 Letter"). The August 13 letter was eight pages in length and contained over one hundred pages in attachments. Waugh filed a Motion to Strike this document on August 19, 2010, contending that it should be stricken because it was inexcusably late, filed in the wrong forum, totally lacking in merit, and sought relief which the Commission could not grant (revocation of certain

licenses, auctioning these licenses, and payment of the proceeds or a portion thereof to Mr. Saito). Waugh also noted that, to the extent that Mr. Saito sought to intervene in the above-captioned proceeding, his effort was three years late and no justification for this late filing was even attempted. In his Memorandum in Opposition to Motion to Strike dated October 26, 2010, Saito requests that Waugh's Motion be stricken,¹ or in the alternative, that his instant motion be accepted pursuant to Sections 1.45(e) and 1.3 of the Rules.

3. As an initial matter, the rules cited by Saito are inapplicable. Section 1.3 permits the Commission to waive its rules for good cause shown "subject to the provisions of the Administrative Procedure Act and the provisions of this chapter."² Section 1.45(e) provides that the Commission may rule *ex parte* "upon requests for continuances and extensions of time, requests for permission to file pleadings in excess of the length prescribed in this chapter, and requests for temporary relief, without waiting for the filing of oppositions or replies" and is, thus, inapposite by its very terms. Although Saito claims that the August 10 letter was not an effort to intervene, but an *ex parte* presentation to the Commission, he fails to recognize that he cannot file pleadings in a revocation proceeding unless he becomes a party by seeking intervention. He can be called as a witness, he can give testimony on his own motion (See Section 1.225) and he can provide documents to the Bureau to assist it in meeting its burden of proof, but he cannot file pleadings unless he intervenes. The Presiding Judge in this case has already denied intervention

¹ Saito contends that because he was not served by regular mail, but only by electronic mail, which "is subject to data corruption, interception, misdirection, transmittal of viruses, cookies, etc.," Waugh's motion should be stricken. He also asserts that service was "apparently" blocked by a "spam blocker" and as a result he did not see the motion until "more than a month after it was allegedly sent." Even if Saito did not see the motion for over a month after it was sent, *i.e.*, until September 19, 2010, it still took him over a month to file the instant memorandum.

² It is submitted that the Commission cannot waive the requirement of elemental due process provided by the *ex parte* rules.

to several parties in this proceeding because they were, *inter alia*, untimely.³ Mr. Saito is over three years late.⁴

4. But even more significantly, Mr. Saito should not be permitted to violate the *ex parte* rules. Mr. Saito now argues that his *ex parte* presentation is exempt because it was “made with the advance approval of the Commission or staff for the clarification or adduction of evidence, or for the resolution of issues, including possible settlement,” citing Section 1.1204(a)(10) and “Letter from the FCC to Mr. Saito, July 21, 2010.” See Memorandum, pp 2 & 3. It also now appears that the August 10 Letter, which was served on the parties, was not Mr. Saito’s first communication with the Commission. He apparently sent a two page letter addressed to the Chairman dated May 12, 2010, received by the Commission on May 20, 2010, and posted on Commission’s Electronic Comment Filing System (“ECFS”) on June 30, 2010.⁵ Thus, it appears that Mr. Saito has violated the Commission’s *ex parte* rules since this earlier letter has not been served on the other parties. It also appears that the Commission has not followed its own rules in dealing with this *ex parte* violation.

³ See, e.g., *Pendleton C. Waugh, et al*, EB Docket No. 07-147, Memorandum Opinion and Order, FCC 09M-48 (ALJ Sippel, rel. July 16, 2009) (denying Motion to Intervene filed by Preferred Investors Association, Inc.); and *Pendleton C. Waugh et al.*, Memorandum Opinion and Order, FCC 08M-09 (ALJ, rel. Feb. 19, 2008). In both cases, the Bureau filed oppositions to the intervention request. In contrast, it has not taken a position on the propriety of Mr. Saito’s filings. Rather, it has simply denied that it solicited Saito’s August 13 letter. See Enforcement Bureau’s Statement of Clarification, para. 3.

⁴ Section 1.223(b) of the Commission’s Rules, 47 CFR Sec. 1.223(b), provides that petitions to intervene must be filed within 30 days after the publication of the hearing designation order in the Federal Register. A person seeking to intervene beyond the 30 days limit must “set forth the interest of the petitioner in the proceeding, show how such petitioner’s participation will assist the Commission in the determination of the issues in question ... must set forth reasons why it was not possible to file a petition within the time proscribed [and] such petition shall be accompanied by the affidavit of a person with knowledge of the facts set forth” therein. 47 CFR Sec. 1.223(c). As noted, the hearing designation order in this proceeding was released July 20, 2007, and published in the Federal Register shortly thereafter.

⁵ See Attachment A, the page from the ECFS relating to Mr. Saito’s letter. Note that it is marked “Confidential” and is not available.

5. The Bureau, in its Clarification, denies that it ever solicited Mr. Saito's comments. Instead it claims that on July 6, 2010, it "became aware" that an "apparently" confidential letter to the Chairman was noted as received by ECFS. The Bureau states that although it did not "receive" a copy of the filing, it nevertheless, on July 21, 2010, sent Mr. Saito's counsel a "courtesy notice" regarding proper service of the letter.⁶ On August 24, 2010, having received no further indication that Mr. Saito had properly served his original letter on the parties, the Bureau stated that it notified General Counsel of the letter filing. Presumably, at this time, the Bureau had received a copy of Saito's August 13 letter which was addressed to the Chairman and to the attention of the Acting Assistant Chief of the Investigations and Hearing Division. The Bureau's "Clarification" raises as many questions as it answers⁷ and not only exhibits a cavalier and haphazard attitude toward what appears to be a serious *ex parte* violation, but seems to indicate a violation of the Commission's *ex parte* rules.

6. Sections 1.1212(c), (d), and (e) of the Commission's Rules provide, in pertinent part that:

(c) Commission personnel who receive written *ex parte* presentations which they believe are prohibited shall forward them to the Office of General Counsel....

(d) Prohibited written *ex parte* presentations and all documentation relating to prohibited written and oral *ex parte* presentations shall be placed in a public file which shall be associated with but not made a part of the record of the proceeding to which the presentations pertain.

(e) If the General Counsel determines that an *ex parte* presentation ... is prohibited by this subpart, he or she shall notify the parties to the proceeding that a prohibited

⁶ The July 21 letter was addressed to Mr. Saito, not his counsel. See Attachment A to Enforcement Bureau's Statement of Clarification.

⁷ For example: Who at the Commission did "receive" the May 12 letter from Saito? Why did it take over a month before it was posted on ECFS? How did the Bureau become aware of "an apparently confidential letter to the Chairman" on July 6, 2010? Did the Bureau actually see the May 12 letter from Mr. Saito before it sent the July 21 letter to him advising of the requirements of the Commission's *ex parte* rules? Is it the policy of the Bureau to contact persons who may have made unlawful *ex parte* presentations to cure them as a courtesy? Why did the Bureau wait until August 24, 2010, to notify the General Counsel?

presentation has occurred and shall serve on the parties copies of the presentation (if written) and any statements describing the circumstances of the presentation. Service by the General Counsel shall not be deemed to cure any violation of the rules against prohibited *ex parte* presentations.

47 C.F.R. Sections 1.1212 (c), (d) and (e). Thus, it appears that, although the Bureau did not receive the *ex parte* communication, it brought it to the attention of the General Counsel, but only after it had communicated with Mr. Saito, as a “courtesy,” apparently in an effort to cure any *ex parte* violation. It appears that only after this effort failed, was the General Counsel informed. Nor has the General Counsel as yet complied with sections (d) and (e). Violation of the *ex parte* rules can be highly prejudicial. Consequently, serious sanctions are imposed for violation of the rules. See Section 1.1216. It is improper for Bureau counsel in a revocation proceeding, as a “courtesy” or otherwise, to assist those guilty of making *ex parte* presentations to cure those violations. And especially disturbing is the fact that this has only come to light now. This can only be viewed as another example of the Bureau’s unreasonable and unchecked prosecutorial zeal which not only prejudices Mr. Waugh, but can taint the entire proceeding.

WHEREFORE, the premises considered, Mr. Saito’s August 13 Letter should be stricken, his Memorandum in Opposition to Motion to Strike should be denied and appropriate sanctions should be imposed. See 47 CFR Sec. 1.1216.

Respectfully submitted,
PENDLETON C. WAUGH

By:  /s/ William D. Silva

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October 29, 2010

ATTACHMENT A

Proceeding Number: 07-147
Name of Filer: Toshiaki(Toshi)Saito
Attorney/Author Name: Toshi Saito
Viewing Status: Confidential
Type of Filing: LETTER
Exparte: No
Date Received: 05/20/2010
Date Posted: 06/30/2010
File Number: 2 pages
Address:
1300 Ala Pili Loop
Honolulu, HI 96818-1635

CERTIFICATE OF SERVICE

I, William D. Silva, certify that I have caused a copy of the foregoing "Reply to Memorandum In Opposition to Motion to Strike and Enforcement Bureau's Statement of Clarification" to be sent by electronic mail, this 29th day of October, 2010, to the following:

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In addition, I, William D. Silva, certify that I have caused a copy of the foregoing "Reply to Memorandum In Opposition to Motion to Strike and Enforcement Bureau's Statement of Clarification" to be sent by U.S. Mail, postage prepaid, this 29th day of October, 2010, to the following:

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/s/ William D. Silva
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